Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD ROE, representing unknown employees of the Philadelphia District Attorney's Office,
Petitioner

v.

RAYMOND CARTER,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION

Respondent attempts to undermine petitioner's petition for writ of certiorari by erroneously characterizing the issues before the Court as questions of state law. However, the questions presented by petitioner are questions of federal law: 1) whether the analysis set forth by this Court in McMillian v. Monroe County, 117 S. Ct. 1734 (1997), applies for purposes of Eleventh Amendment immunity under the United States Constitution; and 2) whether the development of "policy" regarding prosecution is itself a prosecutorial function for purposes of immunity in federal civil rights actions. Resolution of these federal law questions -- both of which are subjects of circuit splits -- is essential to the functioning of all prosecutors, whose central duty -- to bring and try criminal charges -- is increasingly the subject of collateral attack through civil lawsuit. Moreover, the issues presented here are significant even more generally, because they arise whenever courts must determine the availability of sovereign and common law immunity to governmental subdivisions.

I. Respondent erroneously claims that the Third Circuit followed McMillian and denies the existence of the evident conflict among the circuits concerning the applicability of McMillian to the determination of an entity's state status for purposes of Eleventh Amendment immunity.

Respondent would have this Court believe that there is no conflict among the circuits concerning the applicability of McMillian to the determination of an entity's state status for purposes of Eleventh Amendment immunity. First, respondent claims that the Third Circuit actually followed McMillian in this case, despite the fact that the appeals court refused even to cite that decision. Second, respondent claims

that all of the circuits apply the same (McMillian) analysis to the determination of an entity's state status. Both of respondent's claims are without merit.

The Third Circuit's failure to follow McMillian is apparent not only from the fact that the court never mentions McMillian, but also from the analysis employed by the court to reach its decision. For example, in examining the status of the District Attorney -- an officer essentially identical in all relevant respects to the Sheriff in McMillian -- the Third Circuit relied on factors explicitly rejected by this Court in McMillian as determinative of the Sheriff's status:

In McMillian, the Sheriff's salary was paid out of the county treasury, and the county funded the equipment and operational expenses of the Sheriff. This Court rejected these characteristics as dispositive of the Sheriff's status. Yet the Third Circuit relied upon the District Attorney's Office's local funding in concluding that the District Attorney's Office was a local entity.

In McMillian, the Sheriff's jurisdiction was not statewide, but rather, was limited to his own county. This Court rejected this characteristic as dispositive of the Sheriff's status. Yet the Third Circuit relied upon this factor to support its conclusion that the District Attorney's Office was a local entity.

In McMillian, the Sheriff was elected locally by voters within his own county. This Court rejected this characteristic as dispositive of the Sheriff's status. Yet the Third Circuit relied upon this factor in concluding that the District Attorney's Office was a local entity.

Thus, the Third Circuit ignored McMillian in substance as well as in name.

Similarly evident is the conflict that exists among the circuits as to the applicability of McMillian to the determination of an entity's status for purposes of the Eleventh Amendment. Compare, e.g., Franklin v. Zaruba, 150 F.3d 682 (7th Cir. 1998)(court applies McMillian to the determination of an Illinois Sheriff's status for purposes of the Eleventh Amendment and, thus, recognizes that funding does not control the determination of the Sheriff's state or local status), cert. denied, 119 S. Ct. 1033 (1999), with Hudson v. City of New Orleans, 174 F.3d 677 (5th Cir. 1999)(court explicitly rejects McMillian as determinative of District Attorney's Office's state or local status for purposes of the Eleventh Amendment).[1]

In his effort to eliminate the unavoidable conflict among the circuits concerning the applicability of McMillian in the Eleventh Amendment context, respondent not only mischaracterizes the Third Circuit's reasoning here; he also misrepresents the Fifth Circuit's decision in Hudson. Respondent blatantly claims that the Fifth Circuit did not reject the McMillian analysis for purposes of Eleventh Amendment immunity. Respondent's Brief in Opposition, p. 9. It is hard to imagine, however, how the Fifth Circuit could have made its rejection of McMillian any clearer. As the court stated:

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[1] The Orleans Parish District Attorney's Office filed a petition for writ of certiorari in Hudson with this Court on September 15, 1999 (No. 99-459).

> McMillian did not concern the Eleventh Amendment. Instead, it dealt with the issue of county liability in §1983 lawsuits. While we look at the function of the officer being sued in the latter context, we do not in our Eleventh Amendment analysis. See Esteves v. Brock, 106 F.3d 674, 677-78 (5th Cir. 1997)(dealing with county liability in the §1983 context)(distinguishing the result reached in the Eleventh Amendment case of Crane v. Texas, 766 F.2d 193 (5th Cir. 1985)).

Hudson, 174 F.3d at 681 n.1.

Clearly, the Fifth Circuit, as the Third, has unequivocally rejected the McMillian analysis in the Eleventh Amendment context, thereby creating a split among the circuits with respect to this issue. See Franklin v. Zaruba, supra. See also Bibbs v. Newman, 997 F. Supp. 1174 (S.D. Ind. 1998)(court applies McMillian to answer Eleventh Amendment question); Hawkins v. Comparet-Cassani, Case No. CV 98-5605 DDP (CWx), 1999 U.S. Dist. LEXIS 4473 (C.D. Ca. February 3, 1999)(same); Abraham v. Piechowski, 13 F. Supp. 2d 870 (E.D. Wis. 1998)(same); Aleman v. Milwaukee County, 35 F. Supp. 2d 710 (E.D. Wis. 1999)(same); Granville v. Plummer, No. C97-3513 MHP, 1999 U.S. Dist. LEXIS 1395 (N.D. Ca. February 8, 1999)(same); DeGenova v. Sheriff of DuPage County, 18 F. Supp. 2d 848 (N.D. Ill. 1998)(same).[2]

[2] Moreover, respondent's professed belief that McMillian has been rejected by neither the Third Circuit nor any other circuit is belied by respondent's claim that funding is universally determined to be "the most salient factor in determining applicability of Eleventh Amendment immunity." Respondent's Brief in Oppo-

(Continued)

Thus, respondent's attempt to defeat the issuance of a writ of certiorari by claiming that the Third Circuit followed McMillian, and by denying the existence of a split among the circuits as to the applicability of McMillian in the Eleventh Amendment context, must fail. Indeed, his argument effectively concedes that McMillian should control for Eleventh Amendment purposes. The problem is that the Third Circuit disagreed, thereby placing itself in conflict with other federal courts. Thus, this Court's review is required.

II. Respondent ignores altogether the issue of "policymaking" and immunity, thereby failing to acknowledge the conflict among the circuits concerning this issue as well.

Respondent fails to address petitioner's argument that the Third Circuit erroneously characterized all "policymaking" -- even policymaking directly governing the prosecutor's core function of bringing and trying cases -- as nonprosecutorial, enabling plaintiffs to circumvent the protections of Eleventh Amendment and common law immunity by summarily claiming that any and every alleged injury was caused pursuant to "policy." As a result, respondent ignores the conflict among the circuits with respect to the characterization of policymaking regarding prosecutorial responsibilities. Compare Roe v. City and County of San Francisco, 109 F.3d 578 (9th Cir. 1997); Haynesworth v. Miller, 820 F.2d 1245 (D.C. Cir. 1987); Hamilton v. Daley, 777 F.2d 1207 (7th Cir. 1985); with Walker v. City of New York, 974 F.2d 293 (2d

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sition, p. 8. As McMillian makes clear, funding is one, but certainly not the dispositive, factor in the determination of an entity's state or local status for purposes of federal civil liability.

Cir. 1992), cert. denied, 113 S. Ct. 1387, and cert. denied, 113 S. Ct. 1412 (1993); Myers v. County of Orange, 157 F.3d 66 (2d Cir. 1998), cert. denied, 119 S. Ct. 1042 (1999).

Rather than address the merits of the petition for certiorari with respect to the characterization of policymaking regarding prosecutorial responsibilities, respondent summarily dismisses petitioner's arguments, claiming that petitioner contends that "all policies of her office constitute 'law enforcement.'" Respondent's Brief in Opposition, p. 3. But even the most cursory reading of the petition for certiorari indicates that petitioner makes no such claim. Rather, as the petition makes clear, petitioner contends that "the development of policies regarding prosecution is an integral part of the prosecutorial function itself and is entitled to no less immunity than that accorded to actions taken pursuant to such policies." Petitioner's Petition for Writ of Certiorari, p. 25 (emphasis supplied).

Respondent mischaracterizes petitioner's argument regarding policymaking for prosecutorial functions and fails to address the evident conflict among the circuits with respect to this issue.[3]

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[3] Respondent similarly fails to address the petition's related argument that the Third Circuit eliminated any pleading standard, however liberal, with respect to allegations of policy. The appeals court concluded that a plaintiff can plead a claim based upon policy without actually identifying any policy or attributing it to any policymaker. The Third Circuit, thus, has rendered immunity impotent in the face of cursory allegations of "policy."

CONCLUSION

For these reasons, as well as those stated in the petition for writ of certiorari, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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